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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 685

PEOPLE OF THE STATE OF ILLINOIS, Ex. Rel. MAURICE GOLDSTEIN, alias MAURICE GOLD and JACK S. GUTHMAN,

Petitioners.

vs.

JOHN E. BABB, Sheriff of Cook County, Illinois,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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JOHN E. BABB, Sheriff of Cook County, Illinois,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Illinois, entered in the above entitled case on September 23, 1955.

CITATION TO OPINION BELOW.

The judgment of the Supreme Court of the State of Illinois was entered on September 23, 1954. On January 18, 1955, a petition for rehearing was denied, and on that date the Revised Opinion was filed, printed in Appendix A hereto, *infra,* and published in 123 N.E. (2nd) 638.

JURISDICTION.

The judgment of the Supreme Court of the State of Illinois was entered on September 23, 1954. A timely

petition for rehearing filed on October 16, 1954 was denied on January 18, 1955, and on said latter date a revised opinion was filed by said court. On December 28, 1954, the Supreme Court of Illinois extended the time within which to file a petition for writ of certiorari by stay of the mandate of said Court to March 31, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3), since the validity of a state statute on grounds of repugnancy to the Constitution of the United States is drawn in question.

QUESTION PRESENTED.

Whether Chapter 60, Section 2, Ill. Rev. Stat. (1951), known as the Fugitives From Justice Act, is repugnant to Article IV, Sec. II, Clause II of the Constitution of the United States.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

The constitutional provision involved is Article IV, Sec. II, Clause II of the Constitution of the United States. It is printed in Appendix A, *infra* p. 1a. The statutory provision involved is Chapter 60, Sec. 2, Ill. Rev. Stat. (1951). It is printed in Appendix A, *infra* p. 1a.

STATEMENT.

Extradition proceedings for the rendition of petitioners to the State of Ohio were commenced in February, 1953, charging petitioners with having committed a crime on April 7, 1950, in Ohio. Petitioners filed their petition for a writ of *habeas corpus,* August 9, 1953, alleging that their imprisonment was in violation of that portion of the Constitution of the United States relating to the return of fugitives from justice (R. 4A). Trial was had

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August 9, 1953, in the Criminal Court of Cook County. Said writ was quashed and petitioners remanded to custody for rendition to Ohio. Upon trial, petitioners indicated that although allegedly present in the demanding state on the date alleged in the indictment, no proof of an act related to the crime had been presented, and that they were entitled to prove they were only constructively present at the actual time of the criminal act, if any (R. 514). They were foreclosed by the Trial Court's ruling, which stated the Court was concerned only with the question of presence in the demanding state on the date alleged in the indictment (R. 7). The State relied upon Chapter 60, Sec. 2, of the Illinois Revised Statutes (Appendix A, Revised Op., p. 5a). This statute limited the area of the hearing to the constricted fact that "he (petitioner) is not a fugitive from justice of the demanding state, *i. e., that he was not physically present in the demanding state on or about the date upon which the offense with which he is charged is alleged to have been committed* * * *" thereby drawing in question the validity of said statute as repugnant to Article IV, Sec. II, Clause II of the Constitution of the United States. The assignment of errors stated petitioners were not fugitives. The Revised Opinion of the Supreme Court (Appendix B, *infra*, p. 2a) rejected the alleged scope of hearing deemed requisite by petitioners on the basis of the Illinois statute cited (Appendix A, *infra*, p. 6a) without expressly determining the validity of the statute. Nevertheless, petitioners rely upon the constitutional question thus implicitly raised as the basis of both Trial Court and Review proceedings.

REASONS FOR GRANTING THE WRIT.

1. The opinion below is in conflict with the decision of this Court in *Hyatt* v. *Corkran,* 188 U. S. 691 (1903). The decision of the court below in the instant case is also in conflict with the decision of *People* v. *Enright,* 217 N. Y. Supp. 288, 217 App. Div. 514 (1926). This presents a conflict between the highest court of two states. It ignores the holding of this court in *Strassheim* v. *Daily,* 221 U. S. 280 (1911).

The basis of the *Enright* case is that even though the alleged fugitive be present in the demanding state on the date alleged in the indictment for the commission of the crime, where it appears that all acts constituting the actual offense have been performed outside the demanding state, rendition cannot be effected. Chapter 60, Sec. 2 of the Illinois Revised Statutes permits proof only that the accused was not physically present in the demanding state on or about the date upon which the offense with which he is charged is alleged to have been committed. By so limiting the factual showing, the statute improperly forecloses the area of proof thought requisite under Article IV, Sec. II, Clause II of the Constitution of the United States, as enunciated in *Hyatt* v. *Corkran*:

> "We are of opinion that the warrant of the governor is but *prima facie* sufficient to hold the accused, and that it is open to him to show by admissions, such as are herein produced, or by other conclusive evidence, *that the charge upon which extradition is demanded assumes the absence of the accused person from the state at the time the crime was, if ever, committed.* This is in accordance with the authorities in the states, cited in the opinion of Judge Cullen, in the New York Court of Appeals, and is, as we think, founded upon correct principles." (Emphasis Supplied)

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Thus, although the *indictment* of the demanding state is, in fact, predicated upon the commission of a crime by the accused while only constructively present in the demanding state, under the Illinois statute cited, the accused may be surrendered to the demanding state if he was in fact present in the demanding state on the date alleged in the indictment, though his presence was then without relation to the constructively committed crime assumed in the charge. *Hyatt* v. *Corkran* further states that for rendition to be effected "the act shall have been committed by an individual who was at the time of its commission personally present within the state which demands his surrender." Thus, under the Illinois statute cited: (a) the accused is foreclosed from showing that the indictment, in fact, assumes a crime was committed while the accused was only constructively present in the demanding state. This showing may not even be attempted by questions directed to the nature of the offense alleged in the indictment; (b) the state need only show the presence of the accused in the demanding state on the date alleged in the indictment without referring to any action at that date. This conclusively presumes that the facts underlying the indictment, in every instance, do not relate to the constructive presence only of the accused where the accused was in fact present on the date alleged, though the presumption, in fact, be incorrect; (c) although the opinion of this Court in *Strassheim* v. *Daily,* permits rendition where an overt act is committed by the accused within the demanding state "which is, and is intended to be, a material step toward accomplishing a crime" which is consummated while the accused is only constructively present in the demanding state, the requisite that an overt act "forming a material step toward accomplishing a crime" be committed is eliminated under the Illinois

statute, since presence under that statute is sufficient, where the presence occurs on the date alleged in the indictment, even though the indictment assumes the consummation of the crime elsewhere on the same date.

2. Clearly, the question is of importance to all accused persons in the State of Illinois seeking to show they are not fugitives from justice within the constitutional meaning thereof. The cited statute of this State confines them to a definition of "fugitive" narrower than that contemplated by the constitutional provision itself, and is therefore repugnant to that constitutional provision.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Following is Article IV, Section II of the Constitution of the United States:

> "A person, charged in any State, with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

The relevant portion of Chapter 60, Sec. 2, Ill. Rev. Stat. (1951) known as the Fugitives from Justice Act, follows:

> "Any such officer or person may, at the expense of the agent making the demand, execute such warrant anywhere within this state, and require aid as in criminal cases, and may convey such fugitive to any place within this state which the executive in his warrant shall direct, and deliver such fugitive to such agent: Provided, however, that any person so apprehended shall not be delivered into the custody of such agent of the demanding state without first being produced in the circuit court of the county wherein he is arrested, or if arrested in the county of Cook, in the criminal court of Cook County. The judge of the court in which such person is produced shall, in open court, inform the person apprehended of the cause of his arrest, the nature of the process, and inform him that if he claims * * * (4) that he is not a fugitive from justice of the demanding state, *i.e., that he was not physically present in the demanding state on or about the date upon which the offense with which he is charged is alleged to have been committed,* he may have a writ of habeas corpus upon filing an affidavit to that effect, and is entitled to reasonable delay to obtain counsel and avail himself of the laws of this state for the security of personal liberty * * *" (Emphasis Supplied)

APPENDIX B.

(Revised opinion filed on January 18, 1955, upon denial of petition for rehearing.)

Docket No. 33117—Agenda 6—May, 1954.

The People *ex rel.* Maurice Goldstein *et al.*, Appellants v. John E. Rabb, Sheriff, Appellee.

MR. JUSTICE MAXWELL delivered the opinion of the court:

Appellants seek reversal of a judgment of the criminal court of Cook County, in an extradition proceeding, quashing a writ of *habeas corpus* and remanding them to the custody of the respondent, the sheriff of Cook County, to be delivered to the agent of the State of Ohio.

The appellants filed their petition for a writ of *habeas corpus* on February 9, 1953, alleging in substance that they were restrained of their liberty by respondent by virtue of an extradition warrant issued by the Governor of the State of Illinois; that the requisition papers issued by the Governor of Ohio were not in regular legal form; that they were not the particular persons named in the extradition papers; that they were not substantially charged with a crime against the laws of the demanding State; and that they were not fugitives from justice. Respondent filed his return to said petition stating that relators were in his custody by and under authority of a Governor's warrant and rendition issued by the Governor of Illinois upon the requisition of the Governor of Ohio; that all the papers were legal; that relators were fugitives from justice; that they were charged with an offense against

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the laws of Ohio; and that they were the persons named in the extradition papers and in the Governor's warrant.

Upon trial before the court on August 6, 1953, respondent introduced in evidence the Governor's extradition warrant, which stated that the Governor of Ohio demanded the arrest and delivery of Maurice Goldstein, alias Maurice Gold, and Jack S. Guthman as fugitives from justice, and has produced a copy of an indictment certified as authentic by said Governor charging said relators with having committed on the seventh day of April, 1950, in Cuyahoga County, Ohio, the crime of "Larceny by Trick," certified to be a crime under the laws of the State of Ohio, and ordering the arrest of relators, their production in court, and their delivery to the agent of Ohio. The complaining witness, John DeRocca a resident of Cleveland, Ohio, in direct examination, identified the relators, and testified that he had business relationships with them, and that they were at his home in Cleveland on April 7, 1950. DeRocca's wife also testified that relators were at their home in Cleveland on that day. Each of the relators testified in his own behalf, and each denied having been in Cleveland on the day in question.

Upon oral argument before this court the relators conceded that the indictment does substantially charge a crime in Ohio, and that they have failed to overcome the *prima facie* case made by the Governor's warrant and the testimony of respondent's witnesses that they were in Ohio on the date when the offense was alleged to have been committed. Relators' principal contention now, as we understand their argument, is that the court erred in denying them an opportunity to prove that the charge against them was based on their constructive, rather than actual presence in Ohio. They also object to the exclusion of

evidence of the bad faith of the complaining witness in procuring the indictment, such evidence, they contend, being relevant to the witness's credibility.

Upon cross-examination of the witness DeRocca, relators' counsel attempted to show what had occurred between DeRocca and the relators at Cleveland on April 7, 1950. The court sustained objections to these questions, and stated: "Whether this warrant is good or bad I don't know, but I am only concerned with whether or not they were in the State of Ohio and the City of Cleveland at the time this was charged." Relators' position is that mere presence in the demanding State on the date of the offense charged is insufficient to support extradition, and that this presence must be marked by acts associated with the offense. They contend, therefore, that the trial court's ruling was erroneous in that it foreclosed inquiry into the events of April 7, 1950, and thus prevented relators from showing that their presence in Ohio at that time was not connected with the offense.

Ordinarily the scope of inquiry in a *habeas corpus* proceeding to test the validity of an extradition warrant is limited to three questions: Is the accused substantially charged with a crime under the laws of the demanding State? Is the person in custody the person charged? Is he a fugitive from justice? *Roberts* v. *Reilly*, 116 U.S. 80; *People ex rel. Gilbert* v. *Babb*, 415 Ill. 439.

The latter question, the only one with which we are here concerned, is usually determined by the Governor, on proof satisfactory to him that the accused was present in the demanding State on the date when the offense is alleged to have occurred. That administrative determination creates a *prima facie* case sufficient to justify removal, and can only be overcome by proof to the contrary. (*Ex parte*

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Reggel, 114 U.S. 642.) To show that he is not a fugitive from justice the accused must demonstrate conclusively that he was not present in the demanding State, and a mere contradiction in the evidence on this issue will not entitle him to a discharge. *People ex rel. Mortensen* v. *O'Brien*, 371 Ill. 351; *People ex rel. Sedlack* v. *Toman*, 362 Ill. 516.

The kind of presence required to constitute one a fugitive from justice, however, is a physical presence. Constructive presence is not sufficient. (Ill. Rev. Stat. 1953, chap. 60, par. 2; *Hyatt* v. *Corkran*, 188 U.S. 691.) Relators now seek to impose the further limitation that even physical presence is not enough if the accused was not at the time engaged in any acts forming a part of the offense. They cite for this proposition the cases of *Hyatt* v. *Corkran*, 188 U.S. 691; *Strassheim* v. *Daily*, 221 U.S. 280, and *People* v. *Enright*, 217 N.Y.S. 288. Only the last mentioned of these cases supports relators' position.

In the *Hyatt* case it was conceded that the relator had not been physically present in the demanding State when the offense was alleged to have been committed, and all that the case decided was that constructive presence would not suffice. The relators place reliance on the following language in the opinion: "We are of the opinion that the warrant of the Governor is but *prima facie* sufficient to hold the accused, and that it is open to him to show by admissions, such as are herein produced, or by other conclusive evidence, that the charge upon which extradition is demanded assumes the absence of the accused person from the State at the time the crime was, if ever, committed." (188 U.S. 691, 711.) This passage does not state the proposition which relators have advanced, and if it did it would nevertheless be dictum. *Strassheim* v. *Daily*

decided that one who was admittedly not physically present in the demanding State when the offense was completed might nevertheless be extradited if he had previously committed therein an overt act forming a material step toward accomplishing the crime. The case does not hold, nor in our opinion does it intimate, that anything beyond physical presence at the time of the offense is required for extradition. In *People* v. *Enright,* however, where it appeared that all the acts constituting the offense had been performed outside the demanding State, the court held that the relator's physical presence there did not justify extradition, since his presence was for purposes unrelated to the perpetration of the crime.

We are not disposed to follow the *Enright* decision. To allow the relators the defense that their presence in Ohio was unrelated to the crime would permit them to avoid extradition on the ground that they were absent from Ohio on the date when the crime was in fact committed. What our statute requires, however, is that they prove their absence from Ohio on the date when the offense is "alleged to have been committed." The answers which relators sought to elicit from the complaining witness could have had no bearing on that question. The theory advanced by the relators would necessarily require the court to enter upon an inquiry into the factual content and the legal implications of their activities while in the demanding State, and thus in effect to determine whether an offense had then and there been committed. It has long been established that such an inquiry is not within the scope of a *habeas corpus* proceeding. *Strassheim* v. *Daily,* 221 U.S. 280, 283; *People ex rel. Mortensen* v. *O'Brien,* 371 Ill. 351.

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Relators' remaining contention that it was improper to exclude evidence of the complaining witness's bad faith in procuring the indictment is also without merit. It is well established in this State that courts will not inquire into the motive of the complaining witness in an extradition proceeding. His credibility, as well as his good faith, are questions for the courts of the demanding State. *People ex rel. Carr* v. *Murray,* 357 Ill. 326; *People ex rel. Cassleman* v. *O'Brien,* 380 Ill. 290.

The judgment of the criminal court of Cook County is affirmed.

Judgment affirmed.

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JOHN E. BABB, Sheriff of Cook County, Illinois,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

I.

This Court Is Without Jurisdiction to Consider the Question Presented for Review.

The petition is fatally defective in that it does not specify the stage of the proceeding in the court of first instance, and in the appellate court, at which the Federal question sought to be reviewed was raised, the method of raising it or the way in which it was passed upon by the court.

The reason the petition does not comply with this court's Rule 23(f) is that the question presented (Petitioners' Petition, p. 2) "Whether Chapter 60, Section 2, Ill. Rev. Stat. 1951, known as the Fugitives From Justice Act, is repugnant to Article IV, Sec. II, Clause II of the Constitution of the United States", is raised for the first time in this

court. It was not raised in the criminal court of Cook County, the court in which these proceedings originated. It was not raised in the Supreme Court of Illinois upon petitioners' writ of error in that court. It was not raised in petitioners' petition for rehearing in the Supreme Court of Illinois.

Because the question was not raised it was not passed upon by the Illinois courts. This court is without jurisdiction to review the constitutional claim now made (*Edelman* v. *California*, 344 U. S. 357; *Foster* v. *Illinois*, 332 U. S. 134, 139).

II.

The Illinois Fugitives From Justice Act Is Not Unconstitutional.

Petitioners advance as grounds for the granting of petition that the Illinois Fugitives From Justice Act is in conflict to Article IV, Section II, Clause 2 of the Constitution of the United States for the reason that it provides for a judicial determination of four propositions when opposing extradition, namely:

> (1) That the requisition and papers are not in regular and legal form;
>
> (2) That he is not the particular person named in the requisition, indictment or affidavit or in the warrant issued by the Governor;
>
> (3) That he is not substantially charged with a crime against the laws of the demanding state; or
>
> (4) That he is not a fugitive from justice of the demanding state, *i.e.*, that he was not physically present in the demanding state on or about the date upon which the offense with which he is charged is alleged to have been committed. (Ill. Rev. Stat. 1953, ch. 60, par. 2.)

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This section provides, upon the filing of an affidavit setting out any one or more of said allegations, a writ of habeas corpus shall issue and a hearing held. By these provisions Illinois provides judicial safeguards of the essentials for extradition as promulgated by this court. (*Hyatt* v. *Corkran,* 188 U. S. 691; *Appleyard* v. *Massachusetts,* 203 U. S. 222, 230; *McNichols* v. *Pease,* 207 U. S. 100, 108).

III.

Erroneous Rulings Upon Evidence Do Not Achieve the Dignity of a Constitutional Question.

Petitioners complain of the trial court's rulings in limiting evidence. They assert they should have been permitted to introduce testimony of the manner and means by which petitioners were alleged to have committed the crime of "larceny by trick" in Ohio. The evidence offered was of business transactions out of which the crime allegedly arose. (Abst., Ill. Sup. Ct., pp. 7-14.) To permit an examination of such issues would, in effect, result in a determination of guilt or innocence by a court of the asylum state. To do so would usurp the prerogative of the courts of the demanding state. (*Biddinger* v. *Commissioner of Police,* 245 U. S. 128, 135).

There was direct testimony that both of the petitioners were *physically present* in Cleveland, Ohio on April 7, 1950, the date alleged in the indictment. (Abst., Ill. Sup. Ct., pp. 6, 10.) Petitioners denied that they were in Cleveland on the date alleged. (Abst. 11, 12.) The trial court placed credence in the testimony of the witnesses from Ohio and apparently disbelieved that of petitioners. This finding of the trial court is not open to review simply because the evidence of presence in the demanding state is

sharply in conflict. Even if erroneous, the question is not one of constitutional moment.

IV.

The Illinois Decision Is Not in Conflict With the Most Nearly Applicable Decisions of This Court.

Petitioners assert that the opinion of the Supreme Court of Illinois is in conflict with *Hyatt* v. *Corkran*, 188 U. S. 691 and that it ignores the holding of this court in *Strassheim* v. *Daily*, 221 U. S. 280. Petitioners also refer to the case of *People* v. *Enright*, 217 N. Y. Supp. 288.

In discussing the *Enright* case, petitioners' counsel inadvertently say that the *Enright* case and the instant case present "a conflict between the highest courts of two States". The *Enright* case was a decision by the Appellate Division of the Supreme Court of the State of New York. Apparently petitioners' counsel are unaware that despite its appellation as "Supreme", the Supreme Court of New York is not that state's court of last resort but is in its trial division New York's circuit, district or other *nisi prius* court and in its appellate division is that State's intermediate court of appeal. The court of last resort in New York is of course the New York Court of Appeals. Hence there is no "conflict between the highest courts of two States" presented.

In the instant case there was direct, though conflicting evidence, that petitioners were physically present in the State of Ohio at the time alleged in the warrant. In the case of *Hyatt* v. *Corkran* it was conceded that the relator was not within the State of Tennessee at the time of the alleged crimes. (p. 694.)

The *Strassheim* case, if it be assumed that petitioners were not physically present in the demanding state at the

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time charged, affords little comfort to petitioners. That case is authority for the proposition that if one commits an overt act while in the demanding state, which is intended to be a material step toward accomplishing the crime, and then absents himself, he becomes a fugitive from justice.

Conclusion.

For the foregoing reasons respondent prays that the writ be denied.

Respectfully submitted,

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